IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.17 OF 2006

Union of India. ...Petitioner.

Vs.

M/s.Arora Associates. ...Respondent.

Mr.T.J.Pandian, for Petitioner.

Mr.S.C.Gupte i/b. U.L.Panjwani, for Respondent.

CORAM: D.K.DESHMUKH, J.

DATED: 25th April,2006

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator against claim no.1. By the Award made against the claim no.1, the learned Arbitrator has directed the petitioner to pay amount of Rs.7,49,107/- with interest to the respondent. The claim of the respondent was that after the work of improvement to flooring of FOB by

providing anti-skid tiles was awarded to it, the respondent procured the tiles and brought them and stacked them on the railway land. The railway did not indicate the respondent the site where the work was to be carried out. In the meantime the tiles continued to lie and in the due course of time all the tiles were lost. The respondent made complaint to the police but they did not take any action. The learned Arbitrator has upheld the claim made by the claimant. The defence of the petitioner before the learned Arbitrator, it appears, was that the tiles were not actually brought on the railway property by the respondent and in view of Clause 32 of the General conditions of the contract even if it is assumed that the tiles were brought on the land of the railway still the railway cannot be held liable. The learned Arbitrator has held that the claimant has proved that it had brought and stacked the tiles on the land of the railway and the learned Arbitrator has also held that due to inaction of the railway authority the material was stolen and removed and therefore, he has held that the Railway is liable to make good the loss.

2. The petitioner challenges the Award made by

the learned Arbitrator against claim no.1 on the ground that the learned Arbitrator has mis-construed the provisions of clause 32 of the General conditions of the Contract. According to the learned Counsel, the last part of Clause 32 of the condition of the contract in clear terms lays down that the Railway was not answerable for any loss of material caused to the contractor. According to the learned Counsel, this Clause has not been properly appreciated by the learned Arbitrator. The learned Counsel appearing for the respondent-claimant on the other hand submits that it is clear from Clause 32 itself that on the material being brought on site the material becomes the property of the Railway and thereafter, if the property is lost it is the Railway who is responsible. According to the learned Counsel, the learned Arbitrator has considered the Clause 32 in his Award properly and the construction placed on clause 32 by the learned Arbitrator is a possible construction and therefore, the Award made by the learned Arbitrator against claim no.1 cannot be disturbed.

3. For considering the question whether the learned Arbitrator was justified in making the Award

against claim no.1, in view of the rival submission, it is now necessary to see the provision of clause 32 of the Conditions of the Contract between the parties. Clause 32 of the Contract reads as under:-

> “32. Property in materials and plant:- The materials and plant brought by the Contractor upon the site or on the land occupied by the Contractor in connection with the works and intended to be used for the execution thereof shall immediately, they are brought upon the site of the said land, be deemed to be the property of the Railway. Such of them as during the progress of the works are rejected by the Engineer under Clause 25 of these conditions or are declared by him not to be needed for the execution of the works or such as on the grant of the certificate of completion remain unused shall immediately on such rejection, declaration or grant cease to be deemed the property of the Railway and the Contractor may then (but not before) remove them from the site or the said land. This clause shall not in any way diminish the liability of the Contractor nor shall the Railway be in any way answerable for any loss or damage which may happen to or in respect of any such materials

> or plant either by the same being lost, stolen, injured or destroyed by fire, tempest or otherwise.”

Perusal of clause 32 shows that when the material is brought by the contractor on the site or on the land occupied by the contractor in connection with the work with the intention to use that material for the work awarded to him, the material is deemed to be a property of the Railway and such property as is rejected or remain unused on completion of the work ceases to be a property of the Railway and then the Contractor can remove that material from the site. It is clear from clause 32 that the presumption that the material has become the property of the railway arises in relation to the material brought by the contractor on the site or on the land occupied by the contractor in connection with the work with intention to use that material for work. Perusal of the statement of claim shows that, according to the respondent, after the work was awarded to him, he addressed a letter to the Railway asking it to indicate the site where the work is to be carried out. In paragraph 3 , the claimant states as under:-

> "As Claimants did not receive any

> instructions regarding work and the actual site of work and where the anti skid tiles were to be fixed, the Claimants again requested for necessary instructions."

In paragraph no.4 the claimant sates the claimant again requested the respondent for showing the locations where the work was to be executed. In paragraph no.6 the claimant states thus:-

> "The Claimants say that on award of the work, the Claimants had procured the entire quantity of anti skid tiles as required under the relevant tender item and the same was kept stacked at site."

It is clear from the statements made by the claimant that the site for the work was never indicated to it and therefore, there is obviously no question of his stacking the tiles on the site. It is also clear from the statement of claim that the claimant was not given any land to occupy in connection with the work and therefore, really speaking the presumption incorporated in Clause 32 will not arise in relation to the tiles. In any case even assuming that the presumption under Clause 32 of the Contract arise in

relation to the tiles, the last sentence of the clause makes the position clear that though the material brought at the site may be deemed to be a property of the Railway, if the material is lost the Railway is not in any way answerable for the loss. This part of the clause 32 of the Contract was relied on by the petitioner before the learned Arbitrator. The learned Arbitrator has referred to this aspect of the matter in his Award. He has observed thus:-

> “My attention was drawn to Clause 32 of the General Conditions of Contract by the parties. I perused the said Clause, which clearly stipulates that the materials brought by the contract and intended to be used for the execution are deemed to be the property of the Railways in so far as they are required for execution of the work. If any such material was brought by the contractor, which was not needed for execution or is rejected by the Engineer, it ceased to be the deemed property of the Railways but the contractor cannot remove them from the site of work till such rejected or declaration or grant by the railways in this regard. Thus, Clause 32 of the General Conditions of Contract clearly stipulates that all materials brought with the intention of

> carrying out the work are deemed to be the railway property. The Respondents could not show that they have either rejected this material arranged by the Claimants or issued any certificate or declaration permitting the claimants to take back the materials. Thus, the said material is deemed property of the railways and it was for the railways to ensure its protection."

The learned Arbitrator in the Award has further observed thus:-

> "The Railways cannot take the shelter under Clause 32 of the General Conditions of Contract by contending that they would not be responsible or answerable for loss on account of such material being lost or stolen. As this material is the deemed property of the Railways, it was for the railways to ensure its safety. No evidence has been produced before me by the Respondents to show that they have taken any steps to safeguard the deemed property of the Railways. I therefore, award that the Respondents shall pay to the Claimants an amount of Rs.7,49,107/- under the claim towards cost of anti skid tiles procured by the Claimants."

Thus, the learned Arbitrator has held that under clause 32 the cannot deny its liability but the learned Arbitrator has not given any reasons why, if the terms in the contract between the parties clearly states that any material brought on the site by the contractor for the purpose of carrying on work is lost then the Railway is not liable, then the Award can be made by the learned Arbitrator directing the respondent to make good the loss. In my opinion, the Award made by the learned Arbitrator directing the respondent to make good the loss of tiles suffered by the Contractor, is in terms contrary to the later portion of clause 32 of the conditions of the Contract between the parties, and therefore, the Award could not have been made against the claim no.1 by the learned Arbitrator. In the result therefore, the petition succeeds and is allowed. The Award made by the learned Arbitrator against Claim no.1 is set aside. As the Award made against claim no.1 is set aside, obviously, no interest is liable to be paid by the Railway on that amount. The respondent to pay cost of this petition to the petitioner as incurred by the petitioner.